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No. 84-857

In The
Supreme Court of the United States
October Term, 1984

NATIONAL LOSS CONTROL SERVICE CORPORATION

Petitioner,

v.

BILLY CANIPE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LOSS CONTROL SERVICE CORPORATION — PETITIONER

VERSUS — NO. 84-857

BILLY CANIPE — RESPONDENT

RESPONSE TO PETITION FOR CERTIORARI

ARGUMENT

A. Introduction

In a simple negligence case, the District Court for the Northern District of Mississippi granted a summary judgment in favor of the defendant finding that there were no factual issues presented by the plaintiff, and that the defendant was entitled to a judgment as a matter of law. (See *Canipe v. National Loss Control,* 566 F. Supp. 521 (N.D. Miss., 1983). The Fifth Circuit found that the district court had erred in that there were an abundance of factual issues remaining for determination at trial. (See *Canipe v. National Loss Control,* 736 F. 2d 1055 (5th Cir., 1984).

The district court held that the plaintiff had stated a cause of action, but that he had simply not submitted any facts to satisfy the various elements of his cause of action. The only argument presented in the Fifth Circuit by the respondent/plaintiff on his appeal was that there was certain factual evidence submitted to the trial court and ignored by it in its grant of summary judgment. The Fifth Circuit agreed that the affidavit of the plaintiff's expert and other evidence ignored by the trial court created contested issues of fact regarding the performance

of the duty which the petitioner/defendant had admittedly assumed. In view of the affidavit ignored by the trial court, the decision of the Fifth Circuit cannot be considered as a surprise.

The Petitioner raised the issue which it now argues for the first time on a motion for reconsideration before the Fifth Circuit. The Petitioner contends it cannot be liable for its negligent breach of its contractual obligation to discover unsafe conditions including OSHA violations existing at the Respondent's place of employment. In its argument, the Petitioner ignores its breach of its admitted duty to discover unsafe conditions irrespective of the OSHA Code.

The Petitioner urges that the Fifth Circuit decision will have far-reaching implications and is a dramatic divergence from established precedent. Nothing can be further from the facts.

As a cursory review of the Court of Appeals' opinion reveals, the defendant has admittedly contracted to discover unsafe physical conditions including but not limited to specific OSHA violations existing at the Kraft Plant in Memphis, Tennessee where the Respondent was employed at the time of his injury. There is simply no dispute that the Petitioner voluntarily assumed this responsibility and was paid substantial monetary consideration for performing these duties by Kraft. The Petitioner failed to find certain unsafe physical conditions which caused the Respondent's personal injuries. The Respondent merely contends that the Petitioner should be responsible for its own negligence. The Petitioner's position is that it should be able to negligently perform its contrac-

tual obligations and be immune from liability for such negligence.

The decision of the Fifth Circuit has absolutely no implications with regard to the liability of federally employed OSHA inspectors as contended by the Petitioner, as that liability must necessarily be governed by the Federal Torts Claim Act, *28 USC,* § 2671, et seq. (1982). Even though such governmental inspectors can cause liability on behalf of the United States under the authority of *Block v. Neal,* — U.S. —, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983), the lower court's opinion simply does not impact that issue.

It is clear that if the Petitioner's position were upheld, then it could negligently perform its contractual obligations with the clear knowledge that such negligence could lead to injuries to employees such as the Respondent, and would then be completely immune from suit for that negligence. It should be kept in mind that the plaintiff's cause of action includes a subrogation claim on behalf of the Respondent's employer, Kraft, who directly contracted with the Petitioner for the safety inspections.

The Respondent submits that the Petitioner is liable for its negligence just as any other party, and nothing in the Occupational Safety and Health Act implies whatsoever that a party who contracts to discover OSHA violations should be immune from suit for its negligence in performing its voluntarily assumed responsibilities. Even if OSHA had such an effect, the defendant would still be liable in this case because of its contractual obligations to find unsafe conditions irrespective of the employer's compliance with OSHA.

B. Statement of Facts

The Respondent, Billy Canipe, is an adult resident citizen of Memphis, Tennessee and was an employee of Kraft, Inc.'s Humko plant in Memphis, Tennessee on January 31, 1980.

The Petitioner is National Loss Control Service Corporation, which is a corporation engaged in providing safety services to thousands of corporations throughout the country. The Petitioner is paid for the performance of said services by the various parties which contract with the Petitioner.

The Respondent was the operator of a flake roll machine which was used to transform liquid fat into a solid flaked material. This was accomplished by rotating a chilled drum approximately 4 feet in diameter through a vat of liquid material which then solidified upon the drum. The solid material is then scraped off the drum at another point falling into an auger which conveyed the material to the bagging machine.

At the time of the Respondent's injury, he was performing the clean-out procedure of the flake roll machine as he had been taught to do by his supervisors. The procedure required the operator to lift the plexiglass dust cover and to blow the flaked material remaining in the auger to the bottom of the trough where it fell through a hole in the auger trough into the bagging machine. It was necessary that this function be performed while the auger was rotating so that the material blown by the air hose would not be blocked by the auger.

As the Respondent was performing the clean-out operation, his shirt sleeve was caught by a pin at the end of

the auger, pulling the Respondent into the auger. His arm was actually pulled apart between the elbow and shoulder. Mr. Canipe and his arm were transported to a local hospital where the arm was reattached in a fashion. At the present time, the Respondent has no functional use of that arm.

Beginning in 1978, the Petitioner NATLSCO was employed to perform quarterly safety inspections of the plant where the Respondent was injured looking for any unsafe conditions. The Petitioner's inspectors examined the precise machine by which the Respondent was injured. In addition to the quarterly inspections, the Petitioner was specifically requested to perform an inspection for any OSHA violations existing in the plant. Two inspectors spent four days going over the plant with a fine toothed comb.

Despite examining the exact machine in question and criticizing the fact that the switches for the machine were unmarked, the Petitioner's employees failed to note the specific hazard that the plexiglass dust cover over the moving auger did not contain an automatic cutoff switch or safety interlock, that there was no deadman's switch located at the point of operation, and that the switches themselves were located down a flight of stairs and 30 feet away from the point of operation of the machine. Many of these violations, among others, constituted specific OSHA violations as well as violations of good safety practice according to the affidavit of Louis B. Trucks, Ph.D., author of the Alabama OSHA Code.

All witnesses agreed in their depositions that the Petitioner was employed to perform an inspection for

physical hazards and for violations of the OSHA regulations. The documents showed that, in addition, the Petitioner was employed to perform a survey of the job functions. It is also clear in the record from Dr. Louis Trucks' affidavit, that specific physical hazards existed at the plant and that clear OSHA violations were in existence at the plant, particularly regarding the machine which injured the Respondent.

The Respondent's injury resulted from the OSHA violations and other safety deficiencies of the machine which injured the Respondent. It is undisputed that Kraft would have remedied any such OSHA non-compliance had it been reported by the Petitioner as it had a duty to do. Allen Jamison, Kraft's safety director, testified that "if it were an area where we were in non-compliance, cost justifiable or not, you know we would do it."

It is also clear that Kraft delegated a part of its safety inspection function to NATLSCO. Kraft's Corporate Safety Director instructed the local plant safety manager to inspect the plant for OSHA violations. Rather than undertake this inspection himself, he hired NATLSCO to undertake a detailed four day, two month inspection, resulting in a forty page report. The inspectors did not find the hazards ultimately observed by the Respondent's expert and which caused the Respondent's injury.

C. Discussion of Authorities

Despite the efforts of the Petitioner, National Loss Control Services Corporation (hereinafter NATLSCO) to create the impression that this case involves a unique legal theory or a substantial departure from prior law, this case

truly is a quite simple tort case based upon established law. The Petitioner (a company whose sole source of business is providing safety services) agreed with the Respondent's employer (Kraft-Humko) to perform safety inspections and to find unsafe conditions, including specifically OSHA violations existing at the plant. The Petitioner has never contended that it did not assume the duty to find unsafe physical conditions and to find OSHA violations. The Respondent submitted the affidavit of Dr. Louis Trucks, the author of the Alabama OSHA Code, in opposition to the Petitioner's motion for summary judgment in the trial court. He stated that there were numerous unsafe conditions including OSHA violations regarding the machinery which resulted in the plaintiff's injury. The trial court ignored this affidavit completely and stated that there was no factual evidence that the defendant had breached any duty to the plaintiff. The Fifth Circuit relied upon this affidavit among other evidence and found that a factual dispute did exist.

In its Petition for Certiorari, the Petitioner has not contended that the Fifth Circuit erred in concluding that the plaintiff had submitted sufficient evidence to create a factual dispute for the jury. Instead, the Petitioner has argued that under no circumstances should it be held accountable for its failure to carefully perform its contract to locate OSHA violations existing in the Kraft plant. This argument ignores the Petitioner's liability for failing to find unsafe conditions irrespective of whether such conditions constitute OSHA violations. The Petitioner's idea that it can be immune from liability for its own negligence in failing to determine unsafe conditions which it volun-

tarily agreed to find is certainly novel and totally unsupported by any authority.

The Petitioner mischaracterizes the results of the case below as allowing the plaintiff to recover from the Respondent for someone else's OSHA violations. It is true that the plaintiff's employer violated the OSHA code, but it is equally true that the Petitioner specifically assumed a duty to find and make recommendations to the employer regarding any unsafe conditions, including OSHA defects existing at the Kraft plant. The Petitioner entered into a contract with Kraft and was paid substantial consideration for performing safety services. Rather than undertake these particular inspections itself, Kraft decided to hire NATLSCO which held itself out as an expert in the safety field. NATLSCO failed to find the safety hazards which the plaintiff complains resulted in his injury. The Respondent asserts that the Petitioner should be liable for its negligence in performing its assumed duty as any other party is liable for its negligence.

In deciding whether or not this case should be reviewed on certiorari, Rule 17 of the Rules of the Supreme Court of the United States provides guidelines as to what type of case is appropriate for review. The Respondent submits that this case does not fit within any of the guidelines provided in Rule 17 and, in fact, the Petitioner is merely complaining because the Court of Appeals determined that there were factual issues which could only be resolved by the jury, contrary to the district court's decision which ignored certain factual evidence presented by the plaintiff.

The Petitioner attempts to bring this case within the purview of Rule 17 by arguing that the Fifth Circuit opin-

ion is in conflict with the cases of other circuits. However, the cases cited by the Petitioner as being in conflict with the Fifth Circuit opinion in this case are clearly distinguishable.

Primarily, not one case cited by the Petitioner involves a company which contracted to find unsafe work conditions, including specifically OSHA violations. The first case relied upon by the Petitioner is *Skidmore v. Travelers Insurance Co.*, 483 F.2d 267 (5th Cir., 1973) and *Skidmore v. Travelers Insurance Co.*, 356 F. Supp. 670 (E.D. LA, 1973). The district court and the Fifth Circuit in the *Skidmore* cases simply held that OSHA did not create a federal cause of action against employers or their officers or agents who would otherwise be immune under the state's Workmen's Compensation Act. In other words, if the employer or its officers or agents are immune from suit because of workmen's compensation coverage, then the OSHA Act does not create any remedy which could avoid that immunity. The defendant in this case has never claimed workmen's compensation immunity, and therefore *Skidmore* is simply irrelevant.

Jeter v. St. Regis Paper Co., 507 F.2d 973 (5th Cir. 1975) is equally irrelevant as it merely holds that OSHA does not create a private civil federal cause of action. The plaintiff below has never alleged that he was entitled to recover from the Petitioner under any federal cause of action for a violation of OSHA, but has merely asserted a state law claim that the defendant negligently performed a voluntarily assumed duty and, accordingly, is entitled to recover pursuant to the tort theory embodied in § 324A of the *Restatement of Torts, 2d.*

The Petitioner also cited *Melorine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981) which holds that the OSHA Code does not establish a standard of care for a non-employer. The Respondent has again not contended that OSHA created defendant's duty or standard of care, but that its contract with Kraft created its duty. It specifically and voluntarily agreed with NATLSCO to desicover all unsafe conditions including OSHA violations existing in the Kraft plant in Memphis, Tennessee and the plaintiff proved that it failed in that assumed duty.

In *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974) which is heavily relied on by the Petitioner, the court never implied that the plaintiff did not have a state law cause of action against the consulting engineer who failed to follow OSHA standards in shoring a trench. The court simply held that the federal court did not have federal question jurisdiction under *28 U.S.C.*, § 1331 because of a failure to follow OSHA standards. In other words, the court correctly held that OSHA does not in itself create a federal cause of action which did not exist prior to OSHA. Again, the Respondent has never contended that OSHA has such an effect.

The Petitioner next relies upon several cases holding that OSHA inspectors cannot be liable for their negligence which later results in injuries to employees. Although it is irrelevant to this case whether or not an OSHA inspector employed by the United States Government can be held liable under the *Federal Torts Claim Act* (FTCA), *28 U.S.C.* §§2671, et seq. (1982), the Petitioner makes the blatant misstatement that all cases have held that under no circumstances can a federal OSHA inspector be held

liable for his negligent inspections. The cases cited by the Petitioner simply hold that in those cases, the United States could not be liable or that the plaintiff did not make his case. Despite Petitioner's contention to the contrary, the more recent cases indicate that a governmental OSHA inspector can be held liable for his negligence. See *Blessing v. United States,* 447 F. Supp. 1160 (E.D. Pa., 1978); and *Irving v. United States,* 532 F. Supp. 840 (D.C. N.H., 1982).

Likewise, in a closely analogous case, this Court has held that the United States could be liable under the Federal Torts Claim Act for the negligent inspection by a governmental inspector. *Block v. Neal,* — U.S. —, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983). In *Block,* this Court held that if a FmHA inspector negligently inspected the plaintiff's house during construction and the plaintiff relied on that inspection to his detriment, then the plaintiff could recover under the FTCA for the subsequent cracking of the foundation of his house. There can be no policy reason for allowing an injured party to recover for the negligence of an inspector employed by the United States Farmers Home Administration and not one employed by OSHA.

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CONCLUSION

The Fifth Circuit determined that the plaintiff submitted sufficient evidence to overcome the defendant's motion for summary judgment. The Petitioner does not even argue with that finding at this point. Its sole basis for this Petition is that it should not be liable for its negligent performance of its voluntarily assumed duty to observe

and report OSHA violations existing in the Respondent's place of work. The Petitioner has cited no authority in conflict with the Fifth Circuit's decision in this case. There simply is no split of authority among the circuits nor any other approprate basis under Rule 17 of the Supreme Court Rules upon which this Petition is founded. In other words, this is simply not an appropriate case for the grant of certiorari, and the Petitioner does not even assert that the Fifth Circuit wrongly concluded that factual issues existed so as to create a cause of action under §324A of the *Restatement of Torts, 2d.*

Even if the Petitioner were correct in its argument, the Respondent would still be entitled to a trial regarding NATLSCO's failure to report unsafe conditions existing at the plant irrespective of whether such conditions constituted OSHA violations. In addition to its assumed duty to discover OSHA violations, the Petitioner first had a duty to find unsafe physical conditions. Accordingly, NATLSCO would still be liable for its negligent inspection even if the Petitioner were correct in its argument regarding the effect of the Occupational Safety and Health Act.

The Respondent has presented a straightforward case of negligence on the part of the Petitioner and has never been allowed to present that case to the jury. The Fifth Circuit has ruled that the plaintiff is entitled to a trial on the merits and the Petitioner has cited no relevant authority indicating that the Fifth Circuit's decision was incorrectly decided. The Fifth Circuit's decison has no farreachng implications and is merely a holding that factual questions existed and that the lower court's grant of sum-

mary judgment was erroneous. Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

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